

An appeal

- by -

George Swerdelian carrying on business as Keriton Kleaning & Maintenance  
Service

(“Mr. Swerdelian”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

pursuant to Section 112 of the

*Employment Standards Act* R.S.B.C. 1996, C.113

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2012A/31

**DATE OF DECISION:** May 23, 2012

## DECISION

### SUBMISSIONS

George Swerdelian	on his own behalf carrying on business as Keriton Kleaning & Maintenance Service
Kathleen Demic	on behalf of the Director of Employment Standards

### OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by George Swerdelian carrying on business as Keriton Kleaning & Maintenance Services (“Mr. Swerdelian”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 10, 2012.
2. The Determination was made in respect of a complaint filed by Ward Simms (“Mr. Simms”), who alleged Mr. Swerdelian had contravened the *Act* by failing to pay outstanding wages on the termination of his employment.
3. The Director found Mr. Swerdelian had contravened Part 3, section 18 and Part 8, section 63 of the *Act* in respect of Mr. Simms and ordered Mr. Swerdelian to pay Mr. Simms an amount of \$1,266.29, an amount which included wages and interest.
4. The Director also imposed administrative penalties on Mr. Swerdelian under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$500.00.
5. The total amount of the Determination is \$1,766.29.
6. In this appeal Mr. Swerdelian says the Director failed to observe principles of natural justice in making the Determination. Mr. Swerdelian seeks to have the Determination varied, although the appeal is not clear on what parts of the Determination would be varied or what the variance might look like; it appears more probable from the submissions Mr. Swerdelian has made that he seeks to have the Tribunal review and cancel the Determination.
7. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold a specific type of appeal hearing and may choose to hold any combination of oral, electronic or written submission hearing; see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. The Tribunal finds the matters raised in this appeal can be decided from the written submissions and the material on the section 112(5) “record”, together with the submissions of the parties.

### ISSUE

8. The general issue raised in this appeal is whether Mr. Swerdelian has shown there is any error in the Determination that is reviewable on the grounds set out in section 112(1) of the *Act*.

## THE FACTS

9. It is not necessary to set out the facts in great detail. They are provided in the Determination. Briefly, the Determination sets out the following background facts:
  1. Mr. Swerdelian operated a cleaning company in Vernon, B.C. The business fell under the jurisdiction of the *Act*. Mr. Swerdelian had a contract to clean the Rona outlet in Vernon.
  2. Mr. Simms was employed by Mr. Swerdelian to clean at the Rona outlet from January 2011 until May 2, 2011. The latter date was in dispute between the parties. The Director made a finding of fact that May 2, 2011, was the last day worked by Mr. Simms for Mr. Swerdelian. That matter continues to be an issue in this appeal.
  3. Mr. Simms had a regular schedule that included working Mondays, Wednesdays, and Fridays and he was paid \$75.00 a day for that work. There was a dispute about whether Mr. Simms had worked all of the days for which he was scheduled and the Director made findings of fact on that area of dispute. That matter continues to be an issue in this appeal.
  4. Mr. Swerdelian claimed Mr. Simms was not an employee under the *Act*, but an independent contractor. The Director made a decision on Mr. Simms' status under the *Act*, finding he was an employee for the purposes of the *Act*.
10. The Director conducted a complaint investigation, which included interviewing a third party witness and conducting a fact-finding telephone meeting during which the information provided by the third party witness was disclosed to the parties and discussed.
11. The reasons for the decision of the Director that Mr. Simms was an employee for the purposes of the *Act* are set out in the Determination and included: a consideration of the statutory provisions defining employee and employer, a finding that Mr. Swerdelian had effective control of the contract with Rona, of the business, of the wages paid to Mr. Simms, of the work done by Mr. Simms and of his hours of work; a finding that Mr. Simms owned no tools and used the tools and equipment owned or supplied (directly or indirectly) by Mr. Swerdelian; a finding that Mr. Simms had no chance of profit or risk of loss relating to the service provided to Rona; and a finding that the business that carried out the cleaning contract with Rona was Mr. Swerdelian's business.
12. The Director considered a document entitled "*subcontractor terms and conditions agreement*" and, applying section 4 of the *Act*, gave it no effect.
13. The Director received information and documents from Mr. Swerdelian and Mr. Simms concerning whether Mr. Simms had worked all of the days for which he claimed wages and found, on both the objective evidence and a consideration of the relative credibility of the information provided by and on behalf of Mr. Swerdelian and Mr. Simms, in favour of the claims made by Mr. Simms.
14. The Director also found, applying section 66 of the *Act*, that Mr. Simms had been terminated from his employment without cause or notice. The Director found Mr. Simms entitled to length of service compensation under section 63 of the *Act*.

## ARGUMENT

15. In the initial appeal submission, Mr. Swerdelian challenges almost every aspect of the Determination, including the Director's findings on Mr. Simms' status under the *Act* and the findings relating to whether he was owed wages and the amount of wages he was found to be owed. Some of the areas of disagreement are on minor points that would not affect the outcome of the Determination.
16. He says the Director erred in giving no effect to the "subcontractor agreement"; he challenges the statement by the Director that he provided tools or equipment or that he had an account with Rona; he asserts Mr. Simms agreed to adjusting his bi-monthly payments to monthly payments; he says the Director was wrong in stating he was off work due to a back injury or that an injury had any relationship to why he employed Mr. Simms; and he disagrees with the suggestion that he could not do the cleaning work at Rona in April 2011. Mr. Swerdelian's position on the appeal is appropriately summed up in the following paragraph from the appeal:

I totally disagree with [the Director] as I feel she did not consider the facts provided.

17. The Director has provided the section 112(5) "record" and a brief response to Mr. Swerdelian's appeal submissions. The Director's position is that Mr. Swerdelian was not denied an opportunity to know the case against him. He was provided with all of the material and information that was gathered by the Director and given the chance to state his position and to submit material and information in support of it. The Director says, at its core, the appeal provides nothing new and is an attempt by Mr. Swerdelian to re-argue the same case to the Tribunal that he made to the Director.
18. In his final reply, Mr. Swerdelian alleges bias against the Director. He refers to additional points in the material – not raised in the initial appeal submission – that he argues support his original position and his appeal.

## ANALYSIS

19. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112. (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*

- (a) *the director erred in law;*
- (b) *the director failed to observe the principles of natural justice in making the determination;*
- (c) *evidence has become available that was not available at the time the determination was made.*

20. The Tribunal has established certain overriding principles that apply to appeals under section 112 of the *Act*. An appeal under the *Act* is intended to be an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds of review identified in section 112. More particularly, a party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
21. An appeal to the Tribunal under Section 112 is not intended as an opportunity to either resubmit the evidence and argument that was before the Director in the complaint process or submit evidence and

argument that was not provided during the complaint process, hoping to have the Tribunal review and re-weigh the issues and reach different conclusions.

22. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

23. Applying the above principles to this appeal, and for the reasons that follow, I find it must be dismissed.

24. Findings of fact are reviewable as errors of law under the third and fourth categories of the *Gemex* test: that is, if they are based on no evidence or on a view of the facts which could not reasonably be entertained. The Tribunal also noted that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, they are inconsistent with and contradictory to the evidence or they are without any rational foundation.

25. While Mr. Swerdelian has not specifically alleged an error of law by the Director in respect of the findings and conclusions of fact in the Determination, it is implicit in his appeal submissions, that he feels the Director committed errors in several findings concerning Mr. Simms’ claims. He claims the Director “did not consider the facts provided”.

26. The appeal does not show any error of law relating to the relevant and critical facts. The Director did not act without evidence. The Determination neatly outlines the facts that were before the Director and the reasons for reaching the conclusions that were made by the Director on those facts. The Determination shows the view of the facts taken by the Director, and the findings made, were not perverse or inconsistent with the available evidence. They were rationally grounded in the evidence. I find there was no reviewable error on the facts.

27. In the context of the complaint process conducted in this case, the notion of “natural justice” requires the Director to provide all of the parties with a fair opportunity to be heard and to not interfere with that opportunity in an unfair or inappropriate way. That requirement substantially echoes what is set out in section 77 of the *Act*. As the Tribunal stated in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to

the evidence and arguments presented by an adverse party (see *BWI Business World Incorporated*, BC EST # D050/96).

28. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. It is clear from the Determination and the material in the section 112(5) “record” that Mr. Swerdelian was provided with the opportunity to know the claim being made by Mr. Simms and an opportunity to present his position in response to that claim.
29. Mr. Swerdelian alleges bias, but such allegation is simply a bald statement unsupported by any objective evidence demonstrating bias on the part of the Director.
30. While Mr. Swerdelian has grounded the appeal in an alleged failure by the Director to observe principles of natural justice in making the Determination, the appeal does not connect that allegation to any aspect of the complaint process. Rather, the appeal seems to suggest that a natural justice argument – and the bias allegation – lies because, in Mr. Swerdelian’s view, the Director “did not consider the facts provided”. As I stated in *Dongoh Educational Company Ltd.*, BC EST # D049/09, at para. 32, in a comparable appeal argument:
- The Tribunal recognizes persons without legal training do not always appreciate what “natural justice” means, and the concept can be confusing and complex to a lay person. Generally, the notion of “natural justice” requires a decision maker to provide all of the parties with a fair opportunity to be heard and to not interfere with that opportunity in an unfair or inappropriate way. Natural justice does not require the decision maker to accept everything each party says – that would be absurd and make the process unworkable – nor does it prohibit the decision maker from accepting the position of one party and rejecting the position of the other so long as reasons are provided for the choice made and those reasons are based on relevant considerations, which I find they were in this case. In deciding the merits of the complaint, the Director had to make some choices between the competing positions of the parties. The reasons for those choices are explained in the Determination. Dongoh may not like the choices made, but they were provided with an opportunity to present their position in evidence and argument and, in the circumstances, I am unable to accept there was any failure by the Director to observe principles of natural justice in making the choices and the resulting Determination.
31. The above describes exactly the circumstances of the Determination under appeal. There is nothing in the appeal that shows the Director ignored the evidence and information provided by Mr. Swerdelian during the complaint process or was not aware of the inconsistencies in some of the evidence provided by the parties. In all of the key areas challenged by Mr. Swerdelian in his appeal, the Director was faced with competing evidence. The Determination quite clearly indicates the evidence submitted by the parties was considered and that findings were made in respect of it. It is neither a breach of the rules of natural justice nor bias to accept the material and information provided by one party and to reject the material provided by the other. The Director was required to make choices in respect of the position of the parties. Choices were made by the Director; reasons for the choices made were provided in the Determination and appear to be based on relevant considerations. In every respect Mr. Swerdelian was provided with the opportunity required by section 77 of the *Act* and principles of natural justice to present his position and to respond to the position presented by other parties and witnesses.
32. The appeal is dismissed.

**ORDER**

33. Pursuant to section 115 of the *Act*, I order the Determination dated February 10, 2012, be confirmed in the amount of \$1,766.29, together with any interest that has accrued under Section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**